

Pages 1 - 58

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

OWEN DIAZ,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 17-06748-WHO
	)	
TESLA, INC., doing business as	)	
TESLA MOTORS, INC., et al.,	)	
	)	
Defendants.	)	
_____	)	

San Francisco, California  
Monday, February 27, 2023

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

CALIFORNIA CIVIL RIGHTS LAW GROUP  
332 San Anselmo Avenue  
San Anselmo, California 94960  
**BY: LAWRENCE A. ORGAN, ATTORNEY AT LAW**  
**CIMONE A. NUNLEY, ATTORNEY AT LAW**

ALTSHULER BERZON LLP  
177 Post Street, Suite 300  
San Francisco, CA 94108  
**BY: MICHAEL RUBIN, ATTORNEY AT LAW**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

Reported By: Ruth Levine Ekhaus, RMR, RDR, FCRR  
Official Reporter, CSR No. 12219

**APPEARANCES:** (CONTINUED)

For Plaintiff:

COLLIER TETI LLP

1 Sansome Street - Suite 3500

San Francisco, California 94104

**BY: DUSTIN L. COLLIER, ATTORNEY AT LAW**

For Defendant Tesla:

QUINN, EMANUEL, URQUHART

& SULLIVAN LLP

865 South Figueroa Street - 10th Floor

Los Angeles, California 90017

**BY: DANIEL C. POSNER, ATTORNEY AT LAW**

**KATHLEEN M. SULLIVAN, ATTORNEY AT LAW**

QUINN EMANUEL URQUHART

& SULLIVAN, LLP

711 Louisiana Street - Suite 500

Houston, Texas 77002

**BY: ASHER GRIFFIN, ATTORNEY AT LAW**

Monday - February 27, 2023

1:58 p.m.

P R O C E E D I N G S

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**THE CLERK:** All rise.

This Court is now in session.

The Honorable William H. Orrick presiding.

**THE COURT:** Good afternoon, everybody.

**ALL:** Good afternoon, Your Honor.

**THE COURT:** Please be seated. And I will not require you to wear your masks. There aren't enough people in the courtroom. If you would like to wear your mask, you are -- I encourage you to do so, but it's entirely up to you.

**THE CLERK:** We're here in Case Number 17-6748, Diaz versus Tesla, Incorporated.

Counsel, if you would, please come forward and state your appearance.

**MR. RUBIN:** Good afternoon. Michael Rubin, Altschuler Berzon, for the plaintiffs.

**MR. ORGAN:** Larry Organ, Your Honor, for the plaintiff. And Cimone Nunley, also from our firm.

**MR. COLLIER:** Dustin Collier, Your Honor, for the plaintiff.

**MS. HENDERSON:** Good afternoon, Your Honor. Mari Henderson for the defendant.

**MR. POSNER:** Dan Ponser for the defendant, Tesla.

1           **MR. GRIFFIN:** Asher Griffin for the defendant, Tesla,  
2 Your Honor.

3           **MR. ALM:** Joseph Alm for Tesla, Inc.

4           **THE COURT:** Great. Good afternoon.

5           This will be -- this will be something. So I'm looking  
6 forward to it.

7           So there's a number of different things to go over today.

8           First, I want to reiterate what nobody seems to get yet,  
9 and maybe it's because I'm not clear or maybe it's because you  
10 don't want me to be clear; but the parties are stuck with the  
11 decisions they made prior to and at the first trial that  
12 resulted in the evidence that was presented at the first trial.  
13 No one has pointed out to me a manifest error that I made with  
14 respect to that evidence. This is not a retrial. It is a  
15 retrial on damages and punitive damages.

16           And as I've been thinking about the way to present this to  
17 the jury -- we'll get to the preliminary instructions later on.  
18 But what I'm thinking is that I should tell them that we had --  
19 that this trial -- this case is being tried in two phases, and  
20 that we've done the first phase, which is the liability phase.  
21 And now we're doing the second phase, which is damages.

22           And I think that explains for them their job. And I think  
23 it may address some of the issues that came up in the motions  
24 in limine. And I think it may simplify things. But anyway,  
25 that's what I'm thinking about right now.

1           So Robert Hurtado may not testify; Andres Donet may not  
2     testify; Amy Oppenheimer may. No new exhibits. Witnesses who  
3     testified before may testify again. No new incidents. I am  
4     allowing -- because I said I would, a new person most  
5     knowledgeable for Tesla; but she cannot change the substance of  
6     the testimony or testify about changes in Tesla policy.

7           At the same time, while job performance may be irrelevant  
8     to damages, it does provide context. And the -- Tesla may use  
9     that information as it wishes. It can use all the evidence it  
10    presented last time, and it's not precluded from asking  
11    questions in a different way to highlight defenses or minimize  
12    the impact of specific incidents.

13          So the bottom line is that I'm going to -- I'll let you  
14    point out some reason why everything that I've just said  
15    shouldn't apply, but I'm planning to deny all of the  
16    defendant's motions in limine. I'm planning to grant the  
17    plaintiffs' first two, subject to what I've just said, and deny  
18    the remainder of them. And with respect to the deposition --  
19    depositions designations, you can read them as they were read  
20    in the first trial or less than you put in the first trial, but  
21    not more.

22          So that's the first tranche of information.

23          I'll start with the defendants. Is there anything that  
24    you want to point out to me?

25               **MR. GRIFFIN:** Your Honor, again, Asher Griffin on

1     behalf of Tesla.

2             We just want to clarify as to MILs 1 and 2, because the  
3     way that plaintiffs presented their MILs, I think -- I think I  
4     understand your ruling that we're not going to go outside the  
5     temporal scope of October -- October 21st -- I mean  
6     October 2021. We're not going into other instances of  
7     discriminatory conduct and -- but to the extent we, as Tesla's  
8     lawyers, want to ask questions in context for credibility,  
9     it's -- we don't have to read the questions that they asked the  
10    first time.

11            **THE COURT:** Exactly right.

12            **MR. GRIFFIN:** So we can go through and try to put  
13    these instances that we -- were already in the record in  
14    context in the way we think is appropriate.

15            **THE COURT:** You are not bound -- you're bound to the  
16    strategies that your -- the prior counsel for Tesla and Tesla  
17    employed, but you're not bound to every question that they  
18    asked. And you can bring out whatever you're able to bring out  
19    from the evidence that was -- existed before.

20            **MR. GRIFFIN:** Okay. And then, with regards to their  
21    Motion in Limine Number 1, we clearly are not -- we understand  
22    the Court's ruling with regards to liability and the prior  
23    jury's finding, but -- and we're going to abide by the Court's  
24    ruling related thereto, but that's the extent of it. We're  
25    allowed to -- what -- consistent with what you just said,

1 challenge particular instances and go through with plaintiffs'  
2 counsel and plaintiff to discuss the context of the -- each  
3 instance, but -- and we're not -- don't have to concede the  
4 existence of all the allegations that plaintiffs are putting  
5 forward; correct?

6 **THE COURT:** Right. I mean, the jury didn't make a  
7 finding that was specific as to individual incidents. And so I  
8 expect that you'll be trying to show that one or another of  
9 those incidents either -- didn't happen the way that Mr. Diaz  
10 described it. I think that's -- you're not bound by what  
11 the -- the way that the witnesses were cross-examined.

12 **MR. GRIFFIN:** Okay. Thank you, Your Honor. I just  
13 wanted to clarify the extent of the granting of the MILs.

14 **THE COURT:** Mr. Posner, come on up.

15 **MR. POSNER:** Thank you. Dan Posner for Tesla.

16 Your Honor opened by explaining your inclination to tell  
17 the jury that there's been two phases of the trial. We've had  
18 some discussions between the parties meet-and-confer  
19 discussions about whether and to what extent it would be  
20 appropriate to inform the jury that the previous  
21 determinations, which are referenced in a number of places and  
22 in a number of ways, were the result of a prior jury trial or  
23 simply were a prior determination.

24 We think there are plenty of ways to tell the jury what  
25 they need to know about determinations that they need to apply

1 here without telling the jury that the previous determinations  
2 were made in a prior jury trial.

3 We found some authority that seems to recognize that it  
4 could be prejudicial to tell a second jury that first  
5 determinations were made in a prior jury trial. So our  
6 inclination, whether it needs to be a formal order or ruling or  
7 just guidance to the parties, would be to avoid telling the  
8 second jury, unless absolutely necessary for reasons that we  
9 can't contemplate right now, that the previous determinations  
10 were made at a jury trial.

11 **THE COURT:** So -- and I don't actually think that  
12 you're right about that, but I'm willing to go along with that  
13 notion.

14 What I was -- the way that I had -- I phrased it when I  
15 came out here and the way that I'm thinking about it is to say  
16 that the case is being tried in two phases and that this jury's  
17 job is to try the damages phase, not to say anything about how  
18 the first phase was determined. They can figure it was by me,  
19 they could figure -- who knows what they figure. But I won't  
20 be -- I don't plan to be explicit about it, although I really  
21 doubt that you would need to be concerned about that particular  
22 thing. But...

23 **MR. POSNER:** Sufficient. Okay. Thank you, Your  
24 Honor.

25 **THE COURT:** All right. Mr. Rubin?



1           **MR. RUBIN:** Thank you. I would like to address that  
2 last point that Mr. Posner raised.

3           **THE COURT:** Please go ahead.

4           **MR. RUBIN:** We did have a meet-and-confer. Tesla did  
5 inform us just the other day that it was going to ask the Court  
6 to preclude any reference to there having been a prior trial or  
7 a prior jury trial.

8           The reason that Tesla stated that it wants to preclude  
9 that reference is because it's concerned that if the retrial  
10 jury hears that there was a prior trial, whether by jury or  
11 otherwise, it will give, in Tesla's words, undue weight to the  
12 jury's liability findings.

13           There can be no undue weight. Those findings are  
14 conclusive and binding. That's not a reason not to tell the  
15 retrial jury there was a prior trial. Moreover, as you know,  
16 in the course of cross-examining witnesses, there will be  
17 occasions where it may be necessary to impeach a witness by  
18 pointing to the prior testimony in court, in the prior jury  
19 trial.

20           The jury is entitled to know, and we're going to be  
21 required to identify to the jury -- sorry -- to the witness  
22 precisely where that witness testified in an inconsistent  
23 manner, which would be either at the deposition or at the prior  
24 trial where that individual was sworn in and was under oath,  
25 when they gave that testimony.

1       So it will come up, whether there's any need to refer to  
2       it as a "prior jury trial," or a "prior trial," I think it will  
3       just develop over the course of time. But I thought it was  
4       important to let the Court know that the reason for this  
5       request is because Tesla has some belief that, if the prior  
6       proceedings are referred to only as "a determination," that may  
7       somehow induce the jury to give less weight to the prior jury's  
8       findings. And that would be improper in our view.

9       **THE COURT:** The way that the -- that I've drafted,  
10      anyway, the preliminary instructions, I don't think would allow  
11      for that. So it's really a question of whether it's --  
12      somebody says "in the prior jury trial" or "in this courtroom,"  
13      and maybe there's some other -- I'm happy to consider phrasing  
14      that people think will avoid prejudice. I do -- I don't think  
15      that there will be any as a result of this. But I'm happy for  
16      you to continue to talk about that.

17      But I realize that you'll have to -- I think you can avoid  
18      saying "jury trial." You could just say "in this courtroom."  
19      Didn't you say "in this courtroom"?

20      **MR. RUBIN:** I think the circumstances will dictate  
21      what the appropriate term is. We don't need to overuse it for  
22      strategic purposes. On the other hand, we don't want to be  
23      precluded for the other side's strategic purposes as well.

24      **THE COURT:** Yeah. I don't think you have to use the  
25      term "jury," just as an example. And then if there are ways

1 that you-all can work out some other phrasing, that would be  
2 great. And, otherwise, we'll deal with it as we deal with it.

3 **MR. RUBIN:** Thank you.

4 And in response to Mr. Griffen's questions, just to be  
5 sure that I understand, particularly with respect to the  
6 replacement PMK witness -- again, I'm just going back to the  
7 meet-and-confer to make sure we understand.

8 When you said before that the new witness, her testimony  
9 will be as consistent with Ms. Heisen's testimony as possible,  
10 and not materially different than what had previously been  
11 given, we're also talking in terms of the time frame. So, for  
12 example --

13 **THE COURT:** The time frame is the same time frame.  
14 They can't -- Tesla cannot bring up, you know, policies that  
15 were adopted after Mr. Diaz left. Yes.

16 **MR. RUBIN:** That answers my question.

17 Thank you, Your Honor.

18 **MR. GRIFFIN:** Your Honor, may I approach again?

19 **THE COURT:** Of course. That is why we're here.

20 **MR. GRIFFIN:** Thank you, Your Honor. Again, Asher  
21 Griffin on behalf of Tesla.

22 One additional question I had about Tesla's Motion in  
23 Limine 1 and 2. At our prior hearing, we discussed the fact  
24 that -- or in our motion, we requested to bring Mr. Hurtado in,  
25 but for an instruction related to how plaintiffs could refer to

1 Mr. Hurtado's absence at trial. And you indicated an openness  
2 to a potential limitation about Mr. Hurtado and Mr. Donet, and  
3 I just want to know if you have thoughts about that issue.

4 **THE COURT:** Well, so I was thinking that by being  
5 explicit about the first phase and the second phase, that that  
6 would dampen the plaintiffs' ardor in repeating over and over  
7 and over that Mr. Hurtado didn't appear.

8 I mean, I think -- for the second trial, where the jury is  
9 going to hear a lot of the same evidence that the first jury  
10 did, I think it is fair game to -- for them to tell the jury  
11 that Mr. Hurtado didn't appear.

12 I don't -- I think it would be -- it might boomerang on  
13 them if they said that -- made a big point about Mr. Hurtado  
14 not appearing before this jury, because Mr. Hurtado,  
15 apparently, is ready to appear before this jury. I'm not going  
16 to let him because of the difference in the trial, but I think  
17 it would be -- I would expect to hear an objection and I would  
18 expect to say something if -- the point was that they were --  
19 the jury was deprived from hearing from -- about -- from  
20 Mr. Hurtado as a result of Tesla's strategy in the trial before  
21 them.

22 **MR. GRIFFIN:** Thank you, Your Honor.

23 And then in response to Mr. Rubin's statement about the  
24 time period for testimony, we wanted to clarify that with  
25 regards to instances or harm related to Mr. Diaz's allegations,

1 that time is limited to the first trial. Because one question  
2 we had is if there's going to be new medical evidence or expert  
3 evidence between October 2021 and March of 2023 that we haven't  
4 seen or had an opportunity to evaluate before putting -- before  
5 having the opportunity to cross-examine Mr. Diaz.

6 **THE COURT:** Good for the goose, good for the gander.  
7 That's exactly right.

8 I am -- I'll just warn you a little bit further with  
9 respect to the PMK. I'm allowing you to have somebody who was  
10 representing Tesla live. And I'm not restricting you -- and  
11 I'm doing that just out of an -- a sense of what I would need  
12 if I was trying this case in your shoes. I think that's --  
13 it's a fair thing to do.

14 It would be completely unfair and I would get unhinged if  
15 your PMK starts testifying about things in a way that is  
16 broader, different -- materially different than what Ms. Heisen  
17 did. And I would probably be unhinged in front of the jury and  
18 admonish you for that. So I just want you to be very careful  
19 about the parameters for her testimony.

20 **MR. GRIFFIN:** Understood, Your Honor.

21 **THE COURT:** Okay.

22 **MR. GRIFFIN:** And then one point I wanted to clarify  
23 with regards to the decisions that the parties made. My  
24 understanding of your ruling is that the witnesses that  
25 plaintiff called in their case in chief, they can recall. And

1 the witnesses that we called in our case in chief, we can  
2 recall, but that's it.

3 **THE COURT:** No. I tried to be very clear about this.

4 The evidence that was presented -- so if you're trying to  
5 cut -- and you should be very explicit with me because  
6 sometimes my brain just doesn't work very well.

7 If you were referring to Mr. Martinez and whether he  
8 was -- he would be able to be called by the plaintiffs -- is  
9 that what you were referring to?

10 **MR. GRIFFIN:** Yes, Your Honor.

11 **THE COURT:** Yeah. No.

12 The evidence that was presented to the jury the first time  
13 may be presented the second time. I don't care who called  
14 them. I don't care why they called them. They can testify.

15 **MR. GRIFFIN:** Okay, Your Honor. Thank you.

16 **THE COURT:** All right. Anything else on those issues?

17 **MR. ORGAN:** Your Honor, I just have one point of  
18 clarification; and that is: Mr. -- so Mr. Diaz testified about  
19 the ongoing nature of some of the harm from the harassment.  
20 And our expert, Dr. Redding, testified about how that harm  
21 would continue into the future.

22 Assuming they testify consistently with that and don't  
23 testify about anything specific from the last trial to now --  
24 no incidents or anything like that -- I want to make sure that  
25 that is still in line with the Court's ruling because future

1 damages would be contained in that.

2           **THE COURT:** Well, so their testimony was that they  
3 were going to -- in those instances, they were going to  
4 continue, so I don't think that's a -- that's a change in  
5 anything.

6           **MR. ORGAN:** Yeah. I would not -- I would not be  
7 asking him to bring in anything new, just testify consistently  
8 with the way he testified before. Similarly to Dr. Redding,  
9 the same.

10           **THE COURT:** That seems appropriate.

11           **MR. ORGAN:** Okay. Thank you, Your Honor.

12           **THE COURT:** All right. Anything else on those -- on  
13 those issues?

14           **MR. RUBIN:** Not for the plaintiff, Your Honor.

15           **MR. POSNER:** We're okay. We have nothing further on  
16 those issues.

17           **THE COURT:** Okay. All right.

18           Okay. So then, the next issue that I wanted to address  
19 was the questionnaires. And so we're going to send out -- the  
20 jury office is going to send out a questionnaire that we should  
21 receive back, in a SurveyMonkey format, two days before an  
22 instruction conference.

23           So we're going to have -- you should get those on  
24 March 22nd, and then we're going to have a Zoom hearing on  
25 March 24th at 1:30 to go over the survey responses and

1 determine whether you all would stipulate to the excusal of any  
2 people based on their responses to the surveys. And that  
3 will -- that may reduce the number of people who come into the  
4 courtroom on the following Monday for voir dire. I'm expecting  
5 to get about -- I've asked for 50 surveys to be completed; so  
6 hopefully, we'll get at least that number.

7 I've looked at the proposals that you have made with  
8 respect to what should go into the questionnaire, and I am  
9 going to combine a number of those questions with standard  
10 background questions that the Court is using for these  
11 questionnaires, which should give us a pretty good sense of the  
12 hot-button issues.

13 So I will ask about Tesla, and Mr. Musk, and the -- and  
14 issues relating to racial discrimination and problems in the  
15 workplace, views about money compensation in a lawsuit,  
16 people's involvement in making claims, those sorts of things.  
17 So that questionnaire will go out relatively soon, I think.

18 For voir dire, the way that I do it in this court, we'll  
19 have the jurors arranged when they come in, in the order -- in  
20 the random order that you will be selecting them. And so the  
21 number one juror will be -- I think we'll probably have a row  
22 of seats in front of the jury box and the number one juror will  
23 be closest to us, closest to the bench; and then the first  
24 seven or eight will be in the first row and then the next, and  
25 the next. And then, additional people will be in the gallery,



1 the way that we did it the last time.

2 So, you will -- and I will ask questions of everybody, and  
3 then give you each an opportunity to spend about 15 minutes  
4 with each person. I'm going to ask -- we started doing this  
5 during the pandemic and it's worked pretty well. Instead of  
6 passing the mic the way that we used to, I'm going to set up a  
7 podium at the -- behind, where the swinging doors are  
8 basically, and have the jurors walk up there and then tell you  
9 who they are. And you get a sense of who they are from what  
10 they say and how they look, and all those sorts of things.

11 So that's how we'll proceed with that.

12 **MR. GRIFFIN:** Your Honor?

13 **THE COURT:** Yes.

14 **MR. GRIFFIN:** Your Honor, Asher Griffin, again.

15 With regards to the questionnaire, I just want to know if  
16 you want any thoughts or comments from the parties about the  
17 objections. I think there were only two questions in the  
18 questionnaire that there was conflict between the parties.

19 **THE COURT:** Yeah. I don't really, because I'm not  
20 going to use either of those questions.

21 **MR. GRIFFIN:** Okay.

22 **THE COURT:** I'm just making up my -- making up my own  
23 based on your very well-crafted questions, and so I'm okay with  
24 that.

25 **MR. GRIFFIN:** Thank you, Your Honor.

1           **MR. ORGAN:** Your Honor, Larry Organ.

2           Do you want us to send you Word versions of the  
3           questionnaires to make it easier for you to cut and paste?

4           **THE COURT:** No. I'll be able to do that. Thank you.  
5           I appreciate it.

6           **MR. ORGAN:** Okay.

7           And then I did have one other question. In terms of  
8           vaccination, the last time we did the trial, we let the Court  
9           know the vaccination status of the witnesses, and all the  
10          jurors were vaccinated. Do you -- and we told you our team was  
11          all vaccinated.

12          Do you want that same information, Your Honor, this time?

13          **THE COURT:** I was just -- we were just discussing,  
14          before I came into court, what my -- what the rule will be with  
15          respect to masking.

16          On the questionnaire, the questionnaire asks whether the  
17          jurors are vaccinated. It doesn't ask whether they're boosted.  
18          It's the thing that we did a year and a half ago. And it's  
19          still there and I think it gives some information.

20          Once you see all of those, I'll give you the opportunity,  
21          each of you, to decide whether you want to have a completely  
22          vaccinated jury or not. If you don't -- if you want to -- if  
23          you don't agree on it, it's okay with me at this point.

24          With respect to people who open their mouths in court, I  
25          would like them either to be vaccinated or wear a mask. And so

1 if any of your witnesses are not vaccinated, we have clear  
2 masks that people use, and that's fine.

3 I'm not -- the rules have been, as you know, that anybody  
4 who's speaking doesn't have to wear a mask, but everybody else  
5 in the courtroom has been required to wear a mask.

6 I'm interested in your thoughts about this. I think for  
7 jury selection, because there are going to be so many people in  
8 the room, that we'll continue the masking requirement. And  
9 with respect to the jury, there will only be -- you know, I'm  
10 going to have eight jurors. I'm going to select eight jurors.  
11 And there's enough spacing to -- that could allow -- I'm on the  
12 fence, as you can tell -- of the -- I think I will require  
13 masking when people aren't speaking, just out of an abundance  
14 of safety for people.

15 The last trial that I had, which was now a long time ago,  
16 it was in October, the jurors were all thankful that I had  
17 required masking just because they didn't want to have --  
18 distinctions within the jury itself, and they were also  
19 concerned that there would be people that wanted to wear a mask  
20 but would have been peer-pressured out of it.

21 So I think I will. But my mind on that is subject to  
22 change if -- over the next few weeks, if I think differently,  
23 I'll let you know.

24 Let's see.

25 With respect to the questionnaires getting -- I think it's

1 such an advantage for the lawyers to have questionnaires in  
2 advance of voir dire; I think it tells you so much and gives  
3 you an opportunity to learn more things.

4 I just want to caution you to be sure to follow the ABA  
5 guidance on use of social media in learning about the  
6 prospective jurors. You're not to interact in any way with  
7 them. You can use information that is publicly available, but  
8 certainly nothing that would engage them or move beyond what is  
9 available to the public.

10 **MR. COLLIER:** Your Honor, may I approach?

11 **THE COURT:** Yes.

12 **MR. COLLIER:** Dustin Collier for plaintiff. I'm one  
13 of the new ones here.

14 I did want to just follow up on one voir dire issue while  
15 Your Honor is thinking about the questions.

16 **THE COURT:** Yes.

17 **MR. COLLIER:** My colleague, Mr. Rubin, already  
18 mentioned that we have a little bit of concerns about some  
19 comments that we've heard from Tesla's counsel about undue  
20 weight being given to the prior jury's findings.

21 We have a little bit of concern that there -- and I hope  
22 unfounded -- but a little bit of concern that there might be an  
23 active effort to get the jury to sort of disregard the prior  
24 findings. And we wanted to suggest that there be some sort of  
25 question in the Court's voir dire about how the jurors feel

1 about being told they're bound by those prior findings, so we  
2 can sort of suss out if anyone has resistance or reluctance to  
3 being told they have to follow the liability findings of the  
4 Court.

5 **THE COURT:** Well, I'll be asking them during voir dire  
6 about whether they're able to follow my instructions.

7 **MR. COLLIER:** Okay.

8 **THE COURT:** And I usually don't allow people on the  
9 jury who say that they're entitled to go off on frolic of their  
10 own.

11 But I don't -- I'm not planning to -- I'm not going to  
12 include that in the written questionnaire. And the argument --  
13 and I don't expect that the plaintiffs will be making an  
14 argument as was in the paper about this record-setting verdict,  
15 you know, historic in its implications. I expect that we're  
16 not going to hear any of that either.

17 **MR. COLLIER:** I think that's fair, Your Honor.

18 I think our -- the way I was thinking of the question  
19 would be something along the lines of: You've heard, in the  
20 statement of case, that certain things were conclusively  
21 decided in the first phase of the trial. Is there anyone here  
22 that feels any discomfort with the idea of not being able to  
23 assess those first trial issues and being told you're only  
24 assessing damages?

25 Our concern is just some of the rhetoric we have heard

1 from Tesla's counsel in the meet-and-confer effort makes us  
2 concerned they're going to try to get people to draw some  
3 distance and say "Well, I'm going to reevaluate it for myself,"  
4 when they should not.

5 I hope I'm wrong about that. And I hope we can just agree  
6 that anyone who does have that sort of resistance should not  
7 sit on this particular jury.

8 **THE COURT:** Well, if I thought that that was going on,  
9 I would be able to speak up myself.

10 **MR. COLLIER:** Fair enough. Understood, Your Honor.  
11 Thank you.

12 **THE COURT:** Okay. All right.

13 And then, while I'm thinking about voir dire, the -- when  
14 you are asking questions of the prospective jurors, you will be  
15 close to the podium and the podium will be flipped around so  
16 that you can look at folks.

17 Once we get the trial going, I don't like lawyers to be  
18 closer than the edge of the plaintiffs' table to the jury. I  
19 don't like pacing around in front of the jury. I want you to  
20 be within an arm's length or so of the podium. If you don't  
21 want to be behind the podium, that's fine, but I want you to be  
22 pretty close by.

23 All right. I mentioned eight jurors. So you get three  
24 peremptories. On Monday, we'll select the jury and hopefully  
25 get the trial going, so you should be prepared to do your

1 opening and the plaintiffs should be prepared with their first  
2 witness. We may not get there, but I -- I can always hope.

3 Tuesday through Thursday, we're here from 8:30 -- the jury  
4 trial is from 8:30 to 1:30. You'll be here at 8:00 to deal  
5 with any issues that come up.

6 On Friday, we will go all day and my expectation is that  
7 you will be closing in the morning and that the jury will get  
8 to work, and so that's what I'm going to tell the jury, that  
9 they should plan on being here for a full day on Friday.

10 The draft jury instructions. Next on the list.

11 So, Mr. Rubin, do you have some comments?

12 And let me just say that my -- what I told you at the  
13 beginning, I think I would slot in on Instruction Number 2,  
14 after the first two sentences, I think I would say "We're  
15 trying this case in two phases, at the first phase it has been  
16 conclusively determined that," et cetera. And then at the --  
17 in front of the last sentence in that paragraph, I would say  
18 "The second phase is the damages phase. It will be your job to  
19 determine the amount of damages."

20 So that's basically the change that I would make.

21 Mr. Rubin?

22 **MR. RUBIN:** I have three suggestions, Your Honor, on  
23 Instructions Number 10, 12, and 21.

24 **THE COURT:** Okay.

25 **MR. RUBIN:** I don't think any of these should be

1 controversial, but it will help the instructions be a little  
2 more accurate.

3 On 10 --

4 **THE COURT:** Yeah.

5 **MR. RUBIN:** -- the damages. The last of the four  
6 factors here -- the reasonable value of necessary medical care,  
7 and so forth -- I believe the parties stipulated in the prior  
8 trial that there would be no evidence, no damages claim based  
9 on that. So I think we can eliminate that fourth factor.

10 **THE COURT:** Okay.

11 **MR. RUBIN:** On Instruction Number 12, punitive  
12 damages, as Your Honor knows, punitive damages can be both to  
13 punish and to deter; and, in fact, that's what you say in  
14 Instruction Number 9. But I would ask that you add the  
15 reference in the second paragraph: You must use reason in  
16 setting the amount. Punitive damages should be an amount  
17 sufficient to fulfill their purposes of punishment and  
18 deterrence.

19 **THE COURT:** Okay.

20 **MR. RUBIN:** And then in -- and, again, I think this  
21 may harken back to the same issue that some of us have been  
22 talking about in Number 21, conduct of the jury.

23 In two places, since we're telling the jury that it is  
24 limited to considering the evidence presented and your  
25 instructions as a matter of law, in this case there's actually



1 a third factor the jury must consider, which is the prior  
2 determinations.

3 So what I'd propose is in the paragraph that begins  
4 "second" -- "Second because you must decide this case based  
5 only on the evidence received by the case -- in the case, and  
6 on my instructions as to the law and prior determinations that  
7 apply."

8 I think that clarifies to the jury that they are, in fact,  
9 bound by the prior determinations as you've instructed them.

10 And that same language -- or similar language at the very  
11 last paragraph in that page, "These rules protect each party's  
12 right to have this case decided only on evidence that has been  
13 presented here in court and the determinations I've instructed  
14 you to follow."

15 **THE COURT:** I'm going to write it down, Mr. Rubin.  
16 What is it?

17 **MR. RUBIN:** "And the determinations I've instructed  
18 you to follow."

19 I think that will suffice.

20 **THE COURT:** Okay.

21 **MR. RUBIN:** Thank you.

22 **THE COURT:** Thank you.

23 Mr. Posner?

24 **MR. POSNER:** Thank you, Your Honor. Dan Posner for  
25 Tesla.

1 We have, I would say, one overarching comment about the  
2 proposed instructions and a few language wordsmithing things.

3 The overarching issue is that we object to the jury being  
4 instructed about Mr. Diaz's entitlement to any amount of  
5 punitive damages or that the malice, fraud, oppression which we  
6 call the predicate to punitive damages, is a determination from  
7 the first trial that must carry over and that the second jury  
8 must apply it. We feel that the law and fairness would require  
9 the second jury to decide both the predicate and the amount of  
10 punitive damages.

11 The most fundamental reason why is because this is a trial  
12 of not just punitive damages, but compensatory damages and  
13 punitive damages. And as Your Honor recognized earlier, and as  
14 the instruction, Instruction Number 10 in particular, on  
15 compensatory damages recognizes, in this perhaps unusual  
16 situation, all the same evidence is going to come in about harm  
17 that Mr. Diaz allegedly suffered, and he's going to identify  
18 incidents and he's going to put on evidence about the extent of  
19 the harm that he suffered. And Tesla, in turn, has the  
20 opportunity to deny that those incidents occurred and to  
21 show -- provide evidence that the harm that Mr. Diaz suffered,  
22 if any, was minimal or nonexistent.

23 That's the compensatory damages inquiry. Because the  
24 first verdict didn't make specific findings in the verdict  
25 form, it remains Mr. Diaz's burden to prove his compensatory

1 damages by a preponderance of the evidence, what the harm was,  
2 how extensive it was.

3 At the same time, the proposed instructions here would  
4 tell the jury, for example, in Number 9, that it has been  
5 established that Tesla's conduct that harmed Mr. Diaz was  
6 malicious, oppressive, or in reckless disregard of Mr. Diaz's  
7 rights.

8 We're very concerned that an instruction to that effect,  
9 that the jury must find, must accept that the harm -- that  
10 Tesla's conduct that harmed Mr. Diaz was malicious when at the  
11 same time, we have the right and the need to put on evidence  
12 and argue to the jury that it should find the harm was  
13 nonexistent or minimal.

14 And there's no specific incidence of harm that would be  
15 tethered to these instructions about the conduct -- Tesla's  
16 conduct that harmed Mr. Diaz. And so we feel it would be error  
17 and unfair to tell the jury that it must find that any harm was  
18 malicious, oppressive, or reckless.

19 And we are not aware of any case where a retrial proceeds  
20 on both compensatory and punitive damages, but the jury is  
21 instructed that the predicate for punitive damages already  
22 exists and it must accept that. And we feel it must be in part  
23 for this reason. I would say we're also not aware of cases  
24 where a jury has ever been told that it must award some amount  
25 of punitive damages either.

1 But the greater concern we have is the impact of this  
2 instruction on the compensatory damages that we're arguing and  
3 how it might skew the damages higher, unfairly and  
4 unnecessarily. And it really makes it difficult for us to work  
5 with the damages instruction for compensatory damages.

6 Now, one of the reasons why, I believe, Mr. Diaz has  
7 argued that the jury should be instructed about the predicate  
8 for punitive damages is because of Your Honor's first  
9 post-trial order which recognized that there was some  
10 sufficient amount of evidence for, quote, an award of punitive  
11 damages, which is what Your Honor said. And the amount was too  
12 high, but there was enough evidence for an award.

13 And I believe they're latching on to that to say that's an  
14 undisturbed conclusion of the Court based on the evidence from  
15 the first trial and, therefore, it should carry over to the  
16 second.

17 There's really, we think, several reasons why that's not  
18 right. One is, as Your Honor recognized more recently in the  
19 order on the liability and the damages motion that we brought,  
20 the question of liability for a hostile work environment that  
21 the first jury decided is -- is analytically distinct from the  
22 predicate, the punitive damages predicate, malice, fraud, and  
23 oppression. And so our understanding from that order is,  
24 again, the second jury would decide that issue anew.

25 But also the evidence that they're relying on to say

1 there's got to be -- there's some evidence to at least support  
2 some amount of punitive damages, that's the evidence from the  
3 first trial. And when Your Honor made that ruling in the  
4 post-trial order, you were construing the evidence in the light  
5 most favorable to Mr. Diaz, which was the standard at the time.  
6 But that's not the standard for the second trial. And so it  
7 would be wrong to carry over that finding from the post-trial  
8 order to the second trial.

9 And, I think, an example -- you know, taken to its logical  
10 end, Your Honor found that there was sufficient evidence to  
11 support a maximum amount of compensatory damages of one and a  
12 half million, and a maximum amount of punitive damages  
13 something higher than that. Mr. Diaz certainly would not agree  
14 to a cap on compensatory damages based on what Your Honor  
15 found. Your Honor said that the evidence stopped there. They  
16 would never agree to that cap. Why should they benefit from  
17 the floor that carries over?

18 And there's really -- we see no reason -- by rejecting the  
19 remittitur, the damages process started. All the damages  
20 questions should be given to the second jury, so there's no  
21 reason, there's no basis in the post-trial order, nor is it  
22 fair, we submit, to tell the jury that malice, fraud, and  
23 oppression has been established or that it must award some  
24 amount of punitive damages.

25 And so, to bring it home, our objection there -- and we, I

1 think, fairly made this objection in the instructions that we  
2 submitted, we would object entirely to Proposed Instruction  
3 Number 9, which is the determination of punitive damages. We  
4 would -- we would suggest that Your Honor keep Instruction 12,  
5 which we believe is the right formulation and the way for the  
6 jury to be instructed about how it makes the punitive damages  
7 determination in this case.

8 We would -- I don't want to move too quickly, but we would  
9 revise Instruction 2 -- and I could explain how we would  
10 recommend doing that. So maybe it's easiest to start at the  
11 beginning with Instruction 2.

12 This is the first time that the jury is instructed that it  
13 has been determined that Mr. Diaz is entitled to punitive  
14 damages as a result of Tesla's conduct.

15 And if I may, I'd read into the record some language that  
16 we would argue should be placed there instead.

17 That would be (as read):

18 "It has also been determined that, as a result  
19 of Tesla's liability, Mr. Diaz is entitled to recover  
20 from Tesla any past or future noneconomic damages and  
21 any punitive damages that you may find based on the  
22 evidence at this trial."

23 That is the formulation of what we believe the jury's task  
24 should be on the retrial, the same for compensatory and  
25 punitive damages. So we would request that change to Number 2.

1 And then, turning to Number 9, in large part -- you know,  
2 we object, again, to -- the second time now that the  
3 instructions state at the beginning there that it has been  
4 established that Mr. Diaz is entitled to an award of punitive  
5 damages. We believe this instruction is entirely duplicative  
6 of other instructions and unnecessary for that reason as well,  
7 and also potentially confusing. So the first sentence that I  
8 just read, we object to it for the reasons that I've explained,  
9 but it also is repeated in Instruction Number 2.

10 The remainder of this instruction, this determination, is  
11 essentially the same standard that appears in Instruction 12 on  
12 punitive damages with minor variations in words that could  
13 potentially be confusing to the jury.

14 So our ask is to revise Instruction 2 in the way that I  
15 read, to eliminate Number 9, and to retain Number 12 with a  
16 couple of minor changes -- which I guess I might as well say  
17 now.

18 One is that we believe Instruction 12 should add this  
19 language (as read):

20 "The plaintiff has the burden of proving by a  
21 preponderance of the evidence the amount of any  
22 punitive damages."

23 That's the standard of proof. I believe it was read in  
24 the first trial. I believe it's in the model instruction.  
25 I believe both parties proposed it or something similar to

1 that. So we would request that -- that it be added there as  
2 well.

3 I hope -- I've made my point that we can -- and we've  
4 convinced Your Honor. If not, I will certainly want to  
5 preserve our objections to these instructions.

6 But we would, at a minimum, request the -- that Number 9  
7 not be read because it's unnecessary and duplicative. So even  
8 if Your Honor is not inclined to change Number 2 the way we  
9 requested, Number 9 still is duplicative because of the fact  
10 that -- according to Your Honor's proposed instructions -- it  
11 has been determined that Mr. Diaz is entitled to punitive  
12 damages is already in Number 2. You don't need to say it again  
13 in Number 9. And then the rest of it repeats the standard from  
14 12.

15 So that would be our secondary ask subject to preserving  
16 our objections to our primary position.

17 **THE COURT:** So, Mr. Posner, just one question.

18 In 12, I've preserved the -- in the second paragraph, the  
19 "if any" language. And I've also included a nominal damages  
20 instruction. So the -- so if I had determined -- which I did,  
21 as the jury did in the first trial -- that Tesla was -- was  
22 liable for punitive damages -- and the evidence was  
23 unmistakable, in my mind, anyway, that that was the case in the  
24 first trial -- then the -- and that's how I wrote that order,  
25 and that was not a point that you had raised when you asked me



1 in the alternative to -- or when other counsel asked me to  
2 issue the remittitur, why wouldn't the "if any" language and  
3 the nominal damages instruction ameliorate the concern that you  
4 have that this jury wouldn't be fairly viewing the instruction?

5 You'll be arguing it doesn't meet the standard because it  
6 says, "if any," and then \$1 would be awarded and -- which I  
7 might -- you know, I guess another way of doing it is for me to  
8 do it post-trial, but that's -- it just -- why wouldn't -- why  
9 doesn't that solve your problem?

10 **MR. POSNER:** Well, we certainly agree that the "if  
11 any" language is appropriate and that the nominal damages  
12 instruction is appropriate. If anything, I guess -- and if  
13 Your Honor is inclined to give those, as you suggest you are  
14 because they're appropriate, then the instruction that Mr. Diaz  
15 is entitled to some amount of punitive damages is, at a  
16 minimum, confusing, if not wrong, inaccurate.

17 And it is for this jury to decide whether, and to what  
18 extent, Mr. Diaz is entitled to punitive damages. That's  
19 essentially what Number 12 says in the nominal damages  
20 instruction.

21 So to also tell the jury that he's entitled to some amount  
22 of punitive damages, and that the predicate finding has been  
23 made, is unnecessary and confusing, and we think legal error  
24 because of what it -- the way that it impacts our compensatory  
25 damages showing.

1           So we think it is right to tell the jury that it does not  
2           have to award any positive amount of punitive damages, but we  
3           don't think that, as Your Honor says, it ameliorates the  
4           problem of elsewhere instructing the jury that Mr. Diaz is  
5           entitled to punitive damages. So we would suggest that  
6           Your Honor take out that language.

7           **THE COURT:** Mr. Rubin?

8           **MR. RUBIN:** Thank you, Your Honor.

9           Your Honor, we don't see any language in your  
10          Instruction 12 or 9 that says, "if any," and we would object to  
11          adding, "if any."

12          We also object --

13          **THE COURT:** It's on the first line of the second  
14          paragraph.

15          **MR. RUBIN:** "You must use reason in setting the  
16          amount. Punitive damages should be in amounts" --

17          **THE COURT:** "If any, should be an amount sufficient."

18          **MR. RUBIN:** It's not in the version that you sent to  
19          counsel.

20          **MR. POSNER:** It is.

21          **THE COURT:** Are you looking at Number 12?

22          **MR. RUBIN:** I'm looking at Document 406, page 13.

23          **THE COURT:** Are you looking at Instruction Number 12?

24          **MR. RUBIN:** Yes.

25          **THE COURT:** Then it's mysterious, Mr. Rubin -- I don't

1 know.

2 But anyway, the language says punitive damages -- what I'm  
3 proposing anyway, says: You must use reason in setting the  
4 amount. Punitive damages, if any, should be an amount  
5 sufficient to fulfill the purposes.

6 **MR. RUBIN:** Does anyone else have that?

7 **MR. COLLIER:** No, I don't.

8 **MR. RUBIN:** We don't have that --

9 **THE COURT:** Okay.

10 **MR. RUBIN:** Okay. Fine.

11 My concern is not that I'm missing that. I can address  
12 that. My concern is what else we may be missing.

13 We do object to that. And we do object to nominal damages  
14 for punitive damages under the rule of *Hazle versus Crofoot*, we  
15 which cited with respect to nominal damages for compensatory.

16 Given Your Honor's ruling that there has been a prior  
17 determination of liability for punitive damages, we don't  
18 believe the Ninth Circuit law would permit just nominal  
19 punitive damages.

20 **THE COURT:** But how is the jury -- I mean, the  
21 determination of how malicious, oppressive, reckless Tesla has  
22 been is going to be this jury's determination anew. I don't  
23 know how you can -- how this jury could make a determination on  
24 punishment, and an appropriate amount of damages, without  
25 weighing all the evidence. And if they don't view this -- this

1 is the problem that you have walked into, it seems to me.

2 If they look at this in a different way than the first  
3 jury does, they're going to come up with a different number.  
4 And that number might -- they might think that Tesla just did a  
5 swell job.

6 **MR. RUBIN:** Your Honor, they can come up with a low  
7 number. There's no reason they can't come up with a low  
8 number.

9 Nominal damages -- and the Ninth Circuit is clear on this  
10 in *Hazle*, where it referred to the Second Circuit, Eighth  
11 Circuit, and Eleventh Circuit case and when nominal damages are  
12 permitted and when they're not.

13 If the jury finds that the elements of the claim are  
14 satisfied but there's no proof as to any injury, then nominal  
15 damages are appropriate in a civil rights case. If, however,  
16 there's a finding that there has been harm -- as the jury found  
17 with respect to compensatory damages -- and if there's a  
18 finding that punitive damages liability has been established,  
19 the jury has to determine that there's some amount -- not \$1,  
20 but some amount of punitive damages. It could be a very small  
21 amount.

22 It has to evaluate reprehensibility. It has to evaluate  
23 deterrence. It has to be sure not to punish Tesla for injuries  
24 caused to others rather than Mr. Diaz. But nominal damages are  
25 a unique feature, as I understand it, in damages law. I've

1 never actually seen a punitive damages case involving nominal  
2 damages, but it only applies where the elements are established  
3 as a matter of law, but because there has been a complete  
4 failure of proof for some reason as to the amount -- often  
5 happens in breach of contract cases, as in the cases that are  
6 cited -- then the jury awards simply the nominal damages of \$1.

7 But nominal damages for punitive damages award, or for  
8 compensatory damages where there has been a specific finding  
9 that is binding that there has been injury or harm, is  
10 impermissible under *Hazle* for the reasons that the  
11 Ninth Circuit stated.

12 So it is entirely within the jury's discretion to decide  
13 that the punitive damages amount should be very small or very  
14 large -- or whatever it determines based on the facts -- but it  
15 shouldn't be instructed that it can issue a nominal damages  
16 award because that's set for very special purposes under the  
17 law.

18 **THE COURT:** So is the -- is your concern the  
19 instruction itself as opposed to the dollar amount? So is  
20 there any --

21 **MR. RUBIN:** Our --

22 **THE COURT:** Let me finish.

23 Would you be jumping up to object if Tesla argues that,  
24 from everything that you've heard, the amount of money that you  
25 should award for punitive damages is a dollar?

1           **MR. RUBIN:** I would not be jumping up and down on  
2 that.

3           What I'm jumping up and down about is Tesla using an  
4 instruction from this Court to anchor. And if the Court issues  
5 an instruction that specifically says, "You may award nominal  
6 damages of \$1," we will hear that over and over and over again.

7           Tesla can argue that there's miniscule punitive damages,  
8 there is no reprehensibility, there's no need for deterrence.  
9 They can make those arguments. Think it's inconsistent with  
10 the facts. I think your prior orders make clear it's  
11 inconsistent with the facts. But there's a difference between  
12 the arguments of counsel and the instructions of a federal  
13 judge.

14           And I'm concerned that if you put the two together and  
15 Tesla is permitted to argue, from the Court's instructions,  
16 that \$1 may be an appropriate amount of punitive damages, then  
17 we'll hear that over and over again as an anchoring technique.  
18 And I think that would be impermissible.

19           So you should just give them discretion to determine,  
20 based on their own assessment of the evidence, what amount is  
21 an appropriate amount; and both parties will have free reign to  
22 argue whatever the magnitude, small or large, should be.

23           **THE COURT:** And so if I went along with what you're  
24 suggesting, would you agree with Mr. Posner that we should get  
25 rid of punitive -- the Instruction Number 9?

1           **MR. RUBIN:** Number 9 had -- well, obviously Number 9  
2 had the "deter" language that was missing from Number 12.

3           No. No. Absolutely not. That first sentence is the  
4 critical sentence. That is just like --

5           **THE COURT:** But I -- I would have that in Instruction  
6 Number 2. So it's just the second paragraph that --

7           **MR. RUBIN:** Your Honor, this is the first time that I  
8 heard Mr. Posner's argument on this and I'm a little wary  
9 because my version of this instruction seems to be a little  
10 different from everyone else's.

11           **THE COURT:** I don't know why.

12           **MR. RUBIN:** I don't know why either. We'll download a  
13 new copy of Document Number 406. But I would like to take a  
14 careful read of Number 2, 9, and 12 before I answer that  
15 question, if I could.

16           **THE COURT:** Okay.

17           **MR. POSNER:** May I respond?

18           **THE COURT:** Please.

19           **MR. POSNER:** I didn't hear a defense to the  
20 appropriateness of instructing the jury that Mr. Diaz is  
21 entitled to some amount of punitive damages. So I think  
22 Your Honor was right to question -- we think the nominal  
23 damages instruction should remain for reasons I'll mention; but  
24 certainly, if it were to go away, then the jury should not also  
25 be told that there must be some positive amount of punitive

1 damages.

2 I'm not understanding where the lines are being drawn or  
3 what the principled reason is for telling the jury that it must  
4 award something, even if it could be very small. I think  
5 that's just adding confusion, and it's really untethered to  
6 any -- any law.

7 On nominal damages, I think Mr. Rubin was focusing on  
8 certain cases that don't talk about nominal punitive damages,  
9 for one thing. They talk about compensatory damages. Those  
10 cases are quite distinguishable. They really arise in the  
11 context of Section 1983, constitutional violations. And they  
12 recognize that, in those cases where a plaintiff proves a  
13 constitutional violation, a violation of the plaintiff's  
14 constitutional rights, but does not show injury or harm, that  
15 plaintiff is at least entitled to nominal damages. That's  
16 really what those cases say.

17 They certainly don't say that some positive amount of  
18 compensatory damages are required or that a plaintiff in such  
19 cases is absolved of his or her obligation to prove damages  
20 with a preponderance of the evidence.

21 Nominal damages, the instruction was given in the first  
22 trial. It's an appropriate instruction to give in the second  
23 trial too. So I don't want to retract our objection to the  
24 language that Mr. Diaz is entitled to some amount of punitive  
25 damages, but we also think the nominal damages instruction is



1 appropriate.

2 I have a couple more line-edit-type things that I'd like  
3 to get in. I think this is the opportunity to do it, if  
4 Your Honor is willing.

5 The first one is on Instruction 2 -- and we certainly  
6 made -- I made the pitch about substantially changing the  
7 language of one of those sentences. But in subparagraphs, or  
8 points 1 and 2, Your Honor has included the word  
9 "intentionally" in front of the -- you're referring back to the  
10 liability findings and the hostile work environment and the  
11 failure to prevent liability findings. We think those words  
12 "intentionally" must come out. They're not in the elements of  
13 the claim that the jury found in the first trial. There was no  
14 verdict that showed that the jury found some intentional  
15 conduct. And, in fact, our understanding -- my belief is that  
16 they could have prevailed on those claims by showing  
17 negligence. So we think "intentional" would be wrong, legally  
18 wrong, and certainly misleading for the jury.

19 **THE COURT:** Okay.

20 **MR. POSNER:** Okay. On Instruction Number 3, we have  
21 an objection that we -- that we made to reading all these  
22 liability instructions to the jury. I won't -- I won't read  
23 that, restate that, other than to say we maintain it. But if  
24 these instructions are going to come in, we want to make sure  
25 they're accurate.

1           It looks like in Number 3 Your Honor took part of what was  
2   Instruction 27 from the first trial on severe and pervasive and  
3   put that in subparagraph 3 there.

4           We propose to add, at the end of that subparagraph, the  
5   following language: (as read):

6                 "A single incident can be sufficiently severe or  
7         pervasive to constitute harassment."

8           That is an accurate statement of the law. It was part of  
9   Instruction 27, as read before. And we think it's very  
10   important that the second jury knows that. Because, again,  
11   they don't know which incidents or how many incidents the first  
12   jury found; that's not evident from the verdict form. And it  
13   may well be the case. The first jury found a single incident  
14   contributed to the hostile work environment. And we think it  
15   consistent with the law; the second jury must know, if it's  
16   going to be told about what these liability claims were all  
17   about -- that that language should be included.

18          I just note in the title to a number of these  
19   instructions, there's a reference to Title VII, which I believe  
20   is misplaced given the claims that Mr. Diaz raised. So maybe  
21   it came from somewhere, but I wanted to raise that issue.

22          I mentioned before -- and I know I'm kind of picking these  
23   apart in various ways -- but in the punitive damages  
24   Instruction Number 12, we do think it's important to tell the  
25   jury about the preponderance of the evidence burden that

1 Mr. Diaz has, so...

2 THE COURT: So my suggestion is that you file, on ECF,  
3 a -- either in tract changes or in some other way, the  
4 specifics of what you've argued today so that it's clear what  
5 the issue is.

6 MR. POSNER: Yeah. That would be my pleasure.

7 I will say, in Number 12, there is a reference to "any  
8 punitive damages." I think what Your Honor did read is a  
9 little different from what I have as well. So it might make  
10 sense for your clerk to resend us what you have, and then we  
11 can mark those up.

12 THE COURT: Maybe I just snuck this into my own  
13 copy --

14 MR. POSNER: There's one reference to "any punitive  
15 damages," and we think those references should be abundant.  
16 They were there in the first trial, and they're appropriate  
17 here too. So thank you.

18 THE COURT: Okay. Thank you.

19 MR. RUBIN: Final points, Your Honor.

20 With respect to nominal damages, the relevant pages of  
21 *Hazle*, if you want to take a look at it later, are 991 at  
22 Note 6.

23 THE COURT: Great.

24 MR. RUBIN: And then 992, where they talk about the  
25 Supreme Court holding that entitlement to compensatory damages

1 in civil rights actions. *Hazle* was a 1983 action. The Supreme  
2 Court case was a 1983 action. This is a civil rights action as  
3 well.

4 And then 993 is where they cite the Second Circuit, the  
5 Eighth Circuit, and the Eleventh Circuit case for the point  
6 where harm has been established, the plaintiff is entitled to  
7 compensatory, not merely nominal damages.

8 **THE COURT:** Well -- and that's the way that I have --  
9 that I'm thinking about these instructions. I may not have  
10 done them correctly, but the -- I do think that nominal damages  
11 do not apply to compensatory damages.

12 I think they do apply, for the reasons that we were  
13 discussing, with respect to punitives. And I don't know  
14 whether they're case -- whether you have any punitive damages  
15 cases. But I'll look -- I will look again at this.

16 **MR. RUBIN:** That's my point. I think, if you  
17 extrapolate the reasoning from *Hazle* -- which, as you point  
18 out, was a compensatory damages case -- to the punitive damages  
19 context, the same reasoning would apply.

20 **THE COURT:** Yeah. I just -- I see them as distinct. I  
21 see the work that the jury has to do in compensating somebody  
22 for emotional distress is a very different issue than -- than  
23 punitive damages.

24 **MR. RUBIN:** Except, perhaps, once a jury has found  
25 that conduct is malicious, oppressive, or in reckless disregard

1 of plaintiff's rights, in which case it's much like  
2 compensatory damages harm.

3 And as to that point about malicious, oppressive, and  
4 reckless disregard, that's the work that, apparently,  
5 Instruction Number 9 does. If you were to drop Number 9, or  
6 merge it into Number 2 and Number 12, the jury wouldn't be told  
7 that the prior jury had found that Tesla's violation of federal  
8 law was malicious, oppressive, and in disregard of rights, and  
9 what those terms mean.

10 So I think that's why Number 9 is in there and should  
11 remain in there.

12 **THE COURT:** Okay.

13 **MR. POSNER:** That's why we think it should not be in  
14 there, because of the reason I explained.

15 But I do have a few cites on the point about nominal  
16 punitive damages, Your Honor.

17 **THE COURT:** Okay.

18 **MR. POSNER:** This is -- you know, we got these a few  
19 days ago and started looking into it. But there is precedent  
20 to support nominal punitive damages.

21 I'll refer the Court to *Schwenk v. Kavanaugh*,  
22 4 F.Supp.2d 116; *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32;  
23 *Jones v. Lockhart*, 29 F.3d 422; and even *Smith v. Wade* -- which  
24 is a Supreme Court case on which Mr. Diaz relies -- at  
25 461 U.S. 30 at page 52, recognizes the -- well, I might be

1 actually conflating now to a compensatory case. But the first  
2 few I read were punitive -- nominal punitive damages.

3 We certainly disagree that it is proper to extrapolate  
4 from compensatory damages to say that there cannot be nominal  
5 punitive damages either. It's a very different inquiry and  
6 analysis, and so we disagree with that point as well.

7 **THE COURT:** Okay. All right. Thank you for that.

8 The verdict form that I intend to use is basically the --  
9 essentially what the plaintiffs provided. It's very simple.  
10 What past noneconomic damages, what future noneconomic damages,  
11 what amount of punitive damages.

12 So those, I think, are the issues.

13 Mr. Posner?

14 **MR. POSNER:** May I -- just on the verdict form?

15 We added -- you know, this goes back to the issue that we  
16 were talking about, whether the second jury should find --  
17 should be asked to determine the predicate for punitive  
18 damages. We included the question and we would request that it  
19 be given.

20 We made some other small line edits to conform to,  
21 I believe, the verdict form in the first trial, but Your Honor  
22 has those. Thank you.

23 **THE COURT:** Thank you.

24 Mr. Organ?

25 **MR. ORGAN:** My paralegal, Ms. Grislis, asked me to ask

1 a couple of questions on technical issues.

2 **THE COURT:** Okay.

3 **MR. ORGAN:** And that is, in terms of the exhibit  
4 binder, it was our intent to put together one joint exhibit  
5 binder.

6 **THE COURT:** Great.

7 **MR. ORGAN:** All the exhibits do fit into, like, a  
8 one-and-a-half inch binder if we double-side the exhibits. Is  
9 that okay with the Court?

10 **THE COURT:** That's fine by me.

11 **MR. ORGAN:** Okay. And that will avoid us having to  
12 give individual binders, like we did in the last trial because  
13 we had volumes of exhibits. So I'll instruct her on that.

14 And then the next thing is: The Court had the original  
15 deposition transcripts. I don't know whether the Court still  
16 has the original transcripts, but --

17 **THE COURT:** They're not on my bench.

18 **MR. ORGAN:** I didn't think the Court did.

19 What I was going to suggest is that we would agree to  
20 provide the Court with Min-U-Scripts. We did do that,  
21 occasionally, when it was difficult to find those. I don't  
22 believe the parties would disagree, and so...

23 **THE COURT:** Minis are fine, yeah.

24 **MR. ORGAN:** And then we have Min-U-Script transcripts  
25 from the past trial. We would do the same, Your Honor, for

1 that, if that's okay with the Court.

2 THE COURT: That's fine.

3 MR. ORGAN: Okay. Okay. Thank you, Your Honor.

4 THE COURT: Other questions?

5 MR. POSNER: Now is our opportunity, Your Honor.

6 (Reporter interruption.)

7 (Pause in proceedings.)

8 MR. POSNER: I just want to raise an issue about the  
9 interplay between two arguments that we raised, because I'm not  
10 sure how clear it would come through from our papers. But we  
11 are of the view that the jury, the second jury, should be --  
12 should make the punitive damages predicate determination on its  
13 own, and should not be instructed that it has been made.

14 We have argued, in Motion in Limine Number 4, which  
15 Your Honor has denied, that evidence of harm to others should  
16 be excluded from the retrial.

17 I would say that if Your Honor is inclined, over our  
18 objection, to instruct the second jury that the predicate  
19 finding has been made, then it is even less appropriate, if  
20 not, you know, contrary to law, to instruct the jury on harm to  
21 others. And -- or excuse me -- to allow evidence of harm to  
22 others, as identified in our Motion in Limine Number 4.

23 And that's because the cases on which we rely -- these are  
24 all in our Motion in Limine Number 4 -- *State Farm, Philip*  
25 *Morris, White v. Ford* -- they recognize a distinction between



1 when it may be appropriate to introduce evidence of harm to  
2 others and when it's not in a punitive damages case. And they  
3 recognize that it may be appropriate to introduce evidence of  
4 harm to others for purposes of the threshold determination of  
5 whether there was reprehensibility; what we call "the  
6 predicate."

7 It is not appropriate for a jury to consider evidence of  
8 harm to others for sake of the secondary calculation of  
9 punitive damages; "the punishment inquiry," as the cases refer  
10 to it.

11 We feel these cases draw this distinction pretty clearly.  
12 It's often the case -- as it may be the case on this second  
13 trial -- that the jury would decide both the predicate, whether  
14 there was reprehensibility, and then also the degree of  
15 reprehensibility, in which case, these cases that I mentioned,  
16 they use limiting instructions to tell the jury that "You can  
17 consider evidence of harm to others only for determining  
18 reprehensibility, but not for punishing the defendant."

19 But if Your Honor is going to take the predicate  
20 determination of punitives away from the second jury, then we  
21 believe it's quite clear, under these cases, that there really  
22 should be no evidence of harm to others of the type that we  
23 identified in our Motion in Limine Number 4.

24 **THE COURT:** Okay.

25 **MR. POSNER:** I want to make that argument. Thank you.

1           **THE COURT:** Mr. Rubin?

2           **MR. RUBIN:** Thank you.

3           The argument that there should be no punitive damages is,  
4 obviously, inconsistent with what the parties have agreed and  
5 discussed for the last 10 months, and was based on a misreading  
6 of a prior order by this Court. So I'm not going to deal with  
7 the fact that it's waived; that's all in the papers.

8           The question as to whether evidence of the pervasiveness  
9 of racial harassment is relevant to a punitive damages amount  
10 determination after a jury has determined that the conduct is  
11 oppressive, malicious, or in reckless disregard of the  
12 plaintiff's rights absolutely goes to both reprehensibility and  
13 to deterrence.

14          And I don't think we need to reargue the points in our  
15 brief. We laid out and we quoted the language from *Gore*, from  
16 *Philip Morris*, from *State Farm*. The limiting instruction is  
17 the way to deal with it.

18          I think Your Honor understands, but we have fully briefed  
19 those points and we rely on our briefs.

20          **THE COURT:** All right.

21          I am going to allow that evidence to come in in the second  
22 trial. I do think it's -- particularly because you're going to  
23 be arguing, in a variety of ways, how un-reprehensible your  
24 client has been. I think that -- and how un-pervasive --  
25 despite the finding of the Court -- the conduct was.

1 I think that that evidence is -- I think it goes to both  
2 the -- how the damage occurred and also to the degree of  
3 reprehensibility that the jury ought to be able to consider.

4 So -- but thank you for the argument.

5 **MS. HENDERSON:** Your Honor, Mari Henderson for Tesla.

6 I understand that your ruling is that exhibits that were  
7 admitted at the last trial will be admitted again. And  
8 exhibits that were not admitted at the last trial will not be  
9 admitted again. I just wanted to ask about one specific  
10 exhibit.

11 Exhibit 106 was used solely for impeachment purposes. It  
12 was an instance of an N-word used outside of when Owen Diaz was  
13 there, and it was used solely to impeach Ed Romero and Victor  
14 Quintero on the stand when they testified, at the time, that  
15 they did not have any recollection of other times the N-word  
16 was used.

17 If they testify differently at this trial, then it is no  
18 longer impeachment. And so we would ask that -- that  
19 Exhibit 106 not be admitted at this trial, unless the proper  
20 foundation is established.

21 **THE COURT:** Okay.

22 **MR. ORGAN:** Well, Your Honor, the proper foundation  
23 will be established, because regardless of how they testify in  
24 this trial, if they testify in this trial "Oh, yeah, I did  
25 receive the N-word complaint," then I'm entitled to impeach

1    them with their prior statements in the court and in their  
2    depositions.

3           That's proper impeachment; it goes to their absolute  
4    credibility.

5           **THE COURT:** I guess the question -- you're certainly  
6    entitled to impeach them on their credibility. I guess, the  
7    question is -- and I don't, shockingly, have a memory of what  
8    Exhibit 106 is exactly, but --

9           **MR. ORGAN:** 106, Your Honor, was the e-mail from  
10   Mr. Romero, talking about a complaint of use of the N-word in  
11   the elevator area, that was then sent to Mr. Quintero.

12          **THE COURT:** Well, so -- the short answer on this is:  
13   You'll need to give me the document.

14          Because, again, I don't remember exactly what that was and  
15   what the context of it was. And I don't know whether, in this  
16   trial, it's admissible or not. So I'm just going to have to  
17   look at it.

18          If somebody would provide me with things before I am asked  
19   for a ruling, I'd be happier, but -- that's what I'll do.

20          **MR. ORGAN:** We'll certainly do that, Your Honor.

21          **THE COURT:** Okay.

22          **MR. POSNER:** Your Honor, I understand and appreciate  
23   your ruling on harm to others. I just want to bring up the  
24   issue of the evidence of -- that Mr. Wheeler testified to, the  
25   unfortunate incident about the feces evidence.

1           **THE COURT:** A horrible incident.

2           **MR. POSNER:** A horrible incident, unquestionably.

3           There -- separate and apart from whether harm to others  
4 comes in categorically, though, there is wide recognition that  
5 evidence of a material different -- materially dissimilar form  
6 from the type of conduct that harmed the plaintiff really  
7 should not be introduced for purposes of determining an amount  
8 of punitive damages, or even reprehensibility in the first  
9 place.

10          We cited those cases in our motion in limine. We  
11 understand Your Honor's ruling. But I wanted to raise that  
12 issue specifically because we feel it stands alone and is  
13 distanced from some of the other forms.

14          As I understand it, there's no non-speculative evidence in  
15 the record that that incident resulted from racial  
16 discrimination. It's not a racial slur. It's not a drawing.  
17 It's something different. It's obviously inflammatory and  
18 prejudicial, and we would ask Your Honor to take a further  
19 consideration about whether that specific evidence of supposed  
20 harm to others should be -- should come in. And we would  
21 request Your Honor exclude it.

22           **THE COURT:** What's your response to that?

23           **MR. ORGAN:** Well, the feces incident is relevant to  
24 several things.

25          First of all, Mr. Wheeler thought it was race-based.

1 Second of all, Mr. Wheeler noted that he complained about  
2 it and there was no investigation of it, even though they had  
3 surveillance cameras that clearly show that area. So it goes  
4 to Tesla's lack of follow-through, Your Honor, on complaints,  
5 which they're going to come in here and say, "Oh, we  
6 investigated every time," and "We did a great job," and "We're  
7 very thorough in that." So it impeaches that.

8 And then, third, I believe Mr. Diaz testified that he was  
9 aware of the feces incident.

10 So I can't be sure of that, Your Honor.

11 **THE COURT:** I don't -- I don't know about that either.

12 **MR. ORGAN:** Yeah. I'm not sure. But I thought I  
13 heard that. But I won't represent to the Court that that  
14 actually did happen. But I do believe he was aware of that  
15 incident.

16 But the first two grounds are basis to get it in anyway,  
17 Your Honor.

18 **THE COURT:** Okay. I'll go back and read Mr. Wheeler's  
19 testimony. It is fresh in my mind, but not all of details.

20 **MR. ORGAN:** Mr. Rubin informs me it was in his  
21 deposition that testified about it. But he did not testify  
22 about it in trial.

23 **MR. RUBIN:** Oh, wait. His trial testimony --

24 **THE COURT:** When you say "his"?

25 **MR. RUBIN:** Sorry. Mr. Diaz's trial testimony

1 indicated that he knew about it.

2 It isn't all that precise about when he gained that  
3 knowledge, but his deposition testimony was clear that he had  
4 that knowledge. So he was aware of the Wheeler feces incident.  
5 And we can submit that deposition excerpt.

6 **MR. POSNER:** Well, I can read it to you right now,  
7 Your Honor.

8 This is the deposition of Mr. Wheeler from June 12th,  
9 2019, page 57, line 8. And it looks like this is in the docket  
10 at Docket 381-1.

11 **"QUESTION:** Do you think that the feces was put on your  
12 seat in part because you were African American?

13 **"ANSWER:** I could assume that, but I can't say for sure,  
14 so I will not say that. I will say that it was an act  
15 against me, but it could have been anyone."

16 And I'll just close by saying just the mere fact that  
17 Mr. Diaz might have known about this incident, I'm not really  
18 sure how that contributes to harm or reprehensibility or degree  
19 of reprehensibility as relevant to any of the types of conduct  
20 at issue.

21 **THE COURT:** Oh, well, there, I would disagree with  
22 you. If Mr. Diaz knew about it, I could imagine an argument  
23 from the plaintiffs how that would increase the distress that  
24 he felt working for Tesla.

25 **MR. POSNER:** Well, we would argue that the distress

1 and the liability findings that are being applied in the second  
2 trial have to be premised on acts of racial discrimination and  
3 not just general -- I think, the -- one of the Supreme Court  
4 cases, *Smith*, says these dissimilar acts, you don't just punish  
5 a defendant because of unseemly conduct or because they're not  
6 a good person. You punish them because of conduct of a certain  
7 type that caused harm to the plaintiff. This is --

8 **THE COURT:** We're talking about the plaintiff's  
9 testimony, however. If the plaintiff knew about what happened  
10 to Mr. Wheeler while he was feeling the distress that he felt  
11 by being an African-American working at Tesla's factory, and  
12 believed that that was racially motivated, I don't know why  
13 that wouldn't come in.

14 **MR. POSNER:** If there were some basis that it were  
15 racially motivated, clearly racial slurs --

16 **THE COURT:** What he thinks is -- I mean, we're talking  
17 about emotional distress here. It doesn't even have to be  
18 true; it has to be what he believed at the time based on all of  
19 the circumstances.

20 I would think that that was still admissible. You could  
21 tell me differently but --

22 **MR. POSNER:** I think the question then becomes: Where  
23 do you draw the line? A slippery floor or -- I mean, one can  
24 come up with any number of things at the factory that Mr. Diaz  
25 might not have liked. And we would argue that those, really,



1 as a matter of law, can't contribute to liability for hostile  
2 work environment based on racial discrimination and, therefore,  
3 they weren't part of the jury's verdict and cannot be used in  
4 the retrial to form the basis of a damages award.

5 So this is why I'm focused on this incident with  
6 Mr. Wheeler. We're not talking about some of the other harm to  
7 others. This one to us is quite distinct because there's  
8 really no nonspeculative evidence that it was racially  
9 motivated, and that separates it from the others.

10 **THE COURT:** I'll go back and read it. And I'm sure  
11 you'll be able, in your cross-examination, to bring out all of  
12 those distinctions.

13 All right. Anything else?

14 **MR. RUBIN:** Not from the plaintiffs, Your Honor.

15 **MR. POSNER:** Nothing from defendants.

16 **THE COURT:** All right. So I will -- I will consider  
17 if -- Mr. Posner, get the changes that you were interested in,  
18 in the jury instructions. I wrote down Mr. Rubin's. I'll try  
19 and get a revised order draft out as soon as I can. And,  
20 otherwise, I will look forward to seeing you on -- by Zoom on  
21 the 24th.

22 **MR. RUBIN:** Thank you. And will we have an  
23 opportunity to respond to Mr. Posner's new language?

24 **THE COURT:** So if you would like to -- if there are  
25 cases on either side without extensive briefing, I can read

1 cases. If you just wanted to cite me a few cases that you  
2 think are just spot on, and give me a sentence or two, that  
3 would be great. And do that really quickly.

4 **MR. RUBIN:** Any comments will be quick and precise.  
5 Thank you.

6 **THE COURT:** And assuming Mr. Posner does that today,  
7 do it by the end of the week so that I can get them and put  
8 this to rest.

9 **MR. POSNER:** Is it possible that we can have until  
10 tomorrow because I'm flying home after the hearing.

11 **THE COURT:** You can do it tomorrow, and I'm not going  
12 to change the date for the plaintiffs.

13 **MR. POSNER:** Okay.

14 **THE COURT:** All right. Thank you all very much.

15 **MR. POSNER:** Thank you, Your Honor.

16 **MR. RUBIN:** Thank you, Your Honor.

17 **MR. GRIFFIN:** Thank you, Your Honor.

18 (Proceedings adjourned at 3:27 p.m.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Thursday, March 9, 2023

A handwritten signature in blue ink, reading "Ruth Levine Ekhaus", followed by a horizontal line.

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Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219  
Official Reporter, U.S. District Court